U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 April 2007

In the Matter of:
B.C.[1]
Claimant

v. Case No. 2006-BLA-05277

LITTLE DAVID COAL COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:
Andrew Delph, Esq.
For the Claimant

Russell V. Presley, Esq.
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

Granting Modification and Awarding Benefits

This matter involves a claim for disability benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("the Act"), as implemented by 20 C.F.R. Parts 718 and 725. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who die due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

[1] Effective August 1, 2006, the Department of Labor instituted a policy that decisions and orders in cases under the Black Lung Benefits Act which will be available on this Office's website shall not contain the claimant's name. Instead, the claimant's initials will be used.

PROCEDURAL HISTORY

Claimant, B.C., filed his initial claim for benefits on February 15, 1991 (D-1). The claim was denied by the Department of Labor claims examiner on July 3, 1991 for failure to prove any of the elements of eligibility (D-16). Claimant timely requested a hearing before an administrative law judge (D-17). A conference was held on March 17, 1992 (D-35). The corresponding Memorandum of Conference and Stipulation of Uncontested and Contested Issues, dated April 23, 1992, recommended upholding the July 3, 1991 denial. ***Id***. Claimant did not accept the District Director's recommendation, and, again, requested a formal hearing (D-38). A second conference took place on May 26, 1993 to determine the identity of the properly designated responsible operator (D-57). No hearing took place, and Claimant filed a request for modification on October 20, 1993, submitting a single x-ray re-interpretation as the only new evidence to be considered (D-60). The District Director denied the request for modification on October 22, 1993, after which the Claimant requested a formal hearing (D-62, 65).

Administrative Law Judge Stuart A. Levin issued a Decision and Order denying benefits on September 19, 1994 (D-82). While Judge Levin found that the Claimant suffered from a disabling pulmonary impairment arising out of his smoking history, he found that the Claimant failed to establish that he had pneumoconiosis or that his pulmonary disability arose out of coal mine employment. Claimant submitted a second request for modification on August 3, 1995, and Judge Levin issued an Order Denying Modification on May 13, 1996 (D-84, 95). Claimant had only added two x-ray readings to the record, and as both were negative for pneumoconiosis, he failed to establish a change in conditions. Review of the record did not reveal a mistake in determination of fact.

Upon Claimant's submission of additional evidence on March 26, 1997, consisting of a pulmonary function study, a medical report including pulmonary function testing, an x-ray report, and an arterial blood gas study, and miscellaneous progress notes, Claimant initiated a third request for modification (D-96, 97). The District Director entered a Proposed Decision and Order Denying Request for Modification on July 8, 1997 (D-104). The District Director found that the Claimant had failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, and, therefore, had failed to prove a change in conditions. Thereafter, on July 29, 1997, Claimant requested a formal hearing (D-105). Administrative Law Judge Richard A. Morgan issued a Decision and Order Denying Benefits on July 24, 1998 (D-116). Based on review of newly submitted evidence and evidence submitted in conjunction with the original claim, Judge Morgan found that Claimant established that he is totally disabled from a pulmonary standpoint. However, he also concluded that Claimant failed to establish that he suffered from pneumoconiosis arising out of his coal mine employment or that his total disability is due to pneumoconiosis. Accordingly, Judge Morgan found that Claimant had not proven either a change in condition since the last denial of his claim or a mistake in a determination of fact.

On May 13, 1999, Stone Mountain Health Services, on behalf of Claimant, submitted to the District Director evidence consisting of an x-ray reading and pulmonary function testing results, which was accepted as an initiation of another request for modification (D-117, 118). A Proposed Decision and Order Denying Request for Modification was issued on July 15, 1999 based on the District Director's finding that the newly submitted evidence along with the evidence previously in the file does not show that Claimant is totally disabled by coal workers' pneumoconiosis caused by his coal mine employment, and that Claimant "has not established that there is a change in material condition since the time of the prior decision and has not established that a mistake was made in a finding of fact made at the time of the prior decision."

(D-122). Claimant requested a formal hearing on July 20, 1999 (D-123). This case was referred to the Office of Administrative Law Judges by the District Director for a formal hearing on October 29, 1999 (D-129).

A hearing was held in Abingdon, Virginia before Administrative Law Judge Edward Terhune Miller on March 8, 2000, at which Claimant testified and was represented by counsel and all parties were afforded a full opportunity to present evidence and argument. Director's Exhibits one (1) through one-hundred-thirty (130) were admitted into evidence (Tr, 6). Claimant's Exhibit one (1) was also admitted into evidence. However, because Employer had never received a copy of the exhibit, a medical report, Employer was granted forty-five days to respond (Tr, 10-11). Claimant also requested and was granted thirty days leave post-hearing to submit any additional evidence. Employer was granted thirty days from that point in time to submit rebuttal evidence (Tr, 12-17). At the hearing, Employer submitted Employer's Exhibits one (1) through four (4) (Tr 36-37). By cover letter dated April 4, 2000, Claimant submitted Claimant's Exhibits one (1) through five (5). Pursuant to leave by this tribunal, by cover letters dated April 3, April 20, April 24, May 2, and May 17, 2000, Employer submitted Employer's Exhibits five (5) through nine (9), respectively. On October 16, 2001, Judge Miller issued a Decision and Order denying benefits, concluding that the miner failed to establish the presence of pneumoconiosis. The miner was found to be totally disabled, but not due to pneumoconiosis. The causation of pneumoconiosis was not addressed as it was moot, considering the lack of pneumoconiosis. The Employer filed a request for modification on October 9, 2002. A Proposed Decision and Order denying the request for modification was issued on June 24, 2003. The lack of response from the Claimant resulted in the Proposed Decision and Order becoming final on July 24, 2003.

Another claim for benefits was filed by the miner on July 26, 2004. (DX 4-3) A Proposed Decision and Order awarding benefits was issued on August 31, 2005. On September 13, 2005, the Employer sent a letter expressing disagreement with the Decision and Order and requesting a formal hearing before an ALJ.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. There appears to be a discrepancy in the record concerning the appropriate jurisdiction for this claim. Both the Claimant and the Employer operate on the presumption that the law of the Fourth Circuit controls in this case. While the Claimant spent the majority of his employment in the state of Virginia, his last employment was with Jericho Mining in Cumberland Gap, Tennessee. (DX1-2) Therefore, this claim is governed by the law of the United States Court of Appeals for the Sixth Circuit, because the Claimant was last employed in the coal industry in the state of Tennessee within the territorial jurisdiction of that court. ***Shupe v. Director, OWCP***, 12 B.L.R. 1-200 (1989) (en banc).

Furthermore, the procedural status of this case renders the provisions of the 2001 amended regulations inapplicable to this claim. During the initial hearings both parties submitted evidence and proceeded on the belief that the miner's recent claim was a subsequent claim for benefits. A review of the evidentiary record determined that, contrary to initial findings, the most recently filed claim constituted a request for modification. The parties were notified and a telephone hearing was held on March 9, 2007 to discuss the evidentiary limitations in light of the revised procedural status of the case and to hold the record open for submission of evidence in compliance with the rules for limitation of evidence in modification proceedings.

Employer's Counsel, post-hearing, submitted a brief correctly indicating that the initial application was filed in 1991, the Claimant had filed multiple modification requests since the original application, and that no subsequent claims had been filed in this case. Therefore, the request was for modification of a denial of the initial application and the amended regulations were not applicable.

To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director, OWCP***, 9 B.L.R. 1-65 (1986) (en banc). *See* ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director, OWCP***, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The Claimant is a miner for purposes of eligibility under the Black Lung benefits Act.
2. The Claimant's spouse is a dependant for purposes of augmentation.

I have reviewed all of the evidence in the record and I accept the stipulations as they are consistent with the evidence.

ISSUES

1. Whether the claim was timely filed.
2. The length of coal mine employment.
3. Whether the miner suffers from pneumoconiosis.
4. If so, whether pneumoconiosis arose out of coal mine employment.
5. Whether the miner is totally disabled.
6. If so, whether the miner's disability is due to pneumoconiosis.
7. Whether the named employer is the responsible operator.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5

[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

U.S.C. § 556(d).[3] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[4]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

Previously Submitted Evidence

The previously submitted evidence is set forth at Director's Exhibits, case folders 1-4. They are incorporated here by reference.

NEW MEDICAL EVIDENCE

Chest x-rays

Date of X-Ray	Date of Reading	EXH.	Physician	Interpretation
10/25/04	10/25/04	DX10	**Dr. Patel B/BCR**	FQ 1; 1/0; s/s
10/25/04	06/13/05	DX16	**Dr. Wheeler B/BCR**	FQ 1; Negative for CWP
10/25/04	01/10/05	DX12	**Dr. Barrett B/BCR**	FQ 2; Read for film quality but noted bullae, definite emphysema.
06/09/05	07/04/05	DX16	**Dr. Fino B-Reader**	FQ 1; Negative for CWP.
02/14/06	02/15/06	CX1	**Dr. Rasmussen B-Reader**	FQ 1; 1/0; s/s
02/14/06	07/14/06	EX6	**Dr. Scatarige B/BCR**	FQ 1; Negative for CWP
03/01/06	03/01/06	EX1	**Dr. Hippensteel B-Reader**	FQ 1; 0/1; s/s
03/01/06	03/01/06	CX2	**Dr. Deponte B/BCR**	FQ 1; 2/1; s/t

Pulmonary Function Studies

Date	EXH	Physician	HT	AGE	FEV_1	FVC	FEV_1 /FVC	MVV	COOP & Comment
06/09/05	DX16	**Dr. Fino**	66"	59	Pre .57 Post .58	Pre 2.40 Post 2.46	Pre 23.5% Post 23%	-----	Good
10/25/04	DX10	**Dr. Rasmussen**	68"	59	.67	2.07	32%	2.07	
02/14/06	CX1	**Dr. Rasmussen**	66"	60	Pre .73 Post .73	Pre 2.65 Post 2.86	Pre 27.5% Post 25.5%	------	

[3] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[4] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

03/01/06	EX1	**Dr. Hippensteel**	67"	60	Pre .54 Post .60	Pre 1.47 Post 1.42	Pre 36.7% Post 42.5%	25	

Blood-Gas Studies

Date	EXH	Physician	Altitude	Resting(R) Exercise(E)	pCO_2	PO_2	Comments
10/25/04	DX10	**Dr. Rasmussen**	0-2999	R	53	44	
06/09/05	DX16	**Dr. Fino**	0-2999	R	51.4	47.6	
06/08/05	CX	**NCH**	0-2999	R	56.5	49.4	
03/01/06	EX1	**Dr. Hippensteel**	0-2999	R	39.6	56.1	
02/14/06	CX1	**Dr. Rasmussen**	0-29990	R	43.0	46.0	Very severe obstructive ventilatory impairment

Medical Reports

Date of Report **Physician/Facility** **EXH.**

06/09/05 **Dr. Fino** DX16
The claimant smoked 3/4 packs per day from 1958-1998. The Claimant's respiratory impairment is due to emphysema. Insufficient objective evidence to justify a diagnosis of CWP. Totally disabled from performing last coal mine job. Even assuming the presence of pneumoconiosis, the process has not contributed to patient's disability.

06/13/05 **Dr. Agarwal** CX4
Consultation note – Chronic obstructive pulmonary disease, severe; coal workers' pneumoconiosis for which no active intervention is required at this time.

05/13/05 **Dr. Nida** CX4
Consultation report – smoked 1 ppd for 40 years, quit 6 to 7 years ago; chronic obstructive pulmonary disease; history of black lung; no records are available to me.

05/13/05 **Dr. Nida** CX4
Letter – Patient has severe COPD with coal workers' pneumoconiosis; miner qualifies for Black Lung.

10/25/04 **Dr. Rasmussen** DX10
Coal workers' pneumoconiosis, emphysema, and obstructive pulmonary disease caused by coal mine dust exposure. Exposure to other duty environments not associated with coal mine work and cigarette smoking; totally disabled due to chronic lung disease.

03/01/06 **Dr. Hippensteel** EX1
The Claimant smoked less than 1 pack per day from age 14 until quitting at age 50. The conclusion reached after the prior exam remains essentially unchanged. The Claimant is permanently and totally disabled due to worsening bullous emphysema due to cigarette smoking. The Claimant would be just as disabled had he never stepped foot in side a coal mine.

07/11/06 **Dr. Fino** DX16
Additional medical information does not alter or change any opinions from previous reports; miner has severe obstructive abnormality directly related to the inhalation of cigarette smoke; coal mine dust played no role in obstruction.

02/14/06 **Dr. Rasmussen** CX1

Severe total respiratory deficiency as reflected by ventilatory impairment. Does not retain the pulmonary capacity to perform any significant gainful employment especially his last coal mine employment. X-ray changes consistent with pneumoconiosis. Medically reasonable to conclude that has coal workers' pneumoconiosis.

10/25/05 **Dr. Rasmussen** DX10

Coal workers' pneumoconiosis as indicated by x-ray changes very severe and disabling chronic lung disease. No pulmonary capacity to perform last coal mine job. 9 years as roof bolter was major cause of lung disease.

Other Evidence

Date of Report	Physician/Facility	EXH.	Type of Report
05/13/05	**Norton Community Hospital**	CX3	Hospital records and treatment notes.

This Claimant suffers from severe COPD with coal workers' pneumoconiosis. He is very dyspneic and it is well documented by pulmonary function testing that the Claimant has CWP. Chronic obstructive pulmonary disease. To confirm diagnosis, the physician conducted a pulmonary function test, spirometry, and diffusing capacity. No records were available to the physician for review.

06/08/05 **Norton Community Hospital** CX4 Hospital records and treatment notes.

Pulmonary function. Patient put forth good effort. Spirometry shows a severely reduced FVC at 1.57, which is 39% of predicted. Spirometry and lung volumes show very severe obstructive with evidence of air trapping. Diffusing capacity is severely reduced. There is no significant response to bronchodilator. The hospital also performed pulmonary function tests.

06/13/05 **Norton Community Hospital** CX5 Hospital records and treatment notes.

Chronic obstructive pulmonary disease, which is very severe at this time. I have discussed the option of a lung transplant and the patient will be considering this decision. In the meantime, we are going to use oxygen 2.5 via nasal cannula.

05/01/06 **Dr. Hippensteel** EX1 Deposition

Dr. Hippensteel disagrees with Dr. Rasmussen's conclusion that bullous emphysema is associated with simple pneumoconiosis. The literature that Dr. Rasmussen cites does not support his conclusions. I agree with Dr. Fino that coal workers' pneumoconiosis and smoking induced lung disease can be distinguished. I do agree with Dr. Rasmussen that the Claimant is totally disabled. The Claimant has much more extensive and significant smoking history than exposure to coal mine dust to the point of developing bullous emphysema. Bullous emphysema is a congenital disease that usually worsens with advancing age and is aggravated by cigarette smoking. The Claimant does not have legal or medical pneumoconiosis.

Timeliness of Claim

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

It is presumed that a claim is timely filed unless the party opposing entitlement demonstrates it is untimely and there are no "extraordinary circumstances" under which the limitation period should be tolled. *See* ***Dugherty v. Johns Creek Elkhorn Coal Corp.***, 18 B.L.R. 1-95 (1994). The regulations implementing the statutory time limit are more liberal to claimants than the statutory language itself, adding the requirement that the medical determination in question actually be communicated to the claimant, creating a presumption of timeliness that places the burden of showing untimeliness on the employer, and allowing a waiver in extraordinary circumstances." 20 C.F.R. § 725.308(a), (c). These additional requirements are "consistent with the much-quoted premise that the Act is remedial legislation to be liberally construed so as to encompass the largest number of miners within its entitlement provisions." ***Adkins v. Donaldson Mine Co.***, BRB No. 89-2902 (1993). The Benefits Review Board ("the BRB") has held that there are two key showings that an employer must make in order to rebut the presumption of timeliness under these provisions. ***Id***. First, in order to establish that a claimant was notified of the required medical determination, the employer must prove that the miner personally received a written medical report, found to be probative, reasoned, and documented by the administrative law judge, indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware or in the exercise of reasonable diligence, should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. ***Id***.

Apart from a general allegation that the Claimant's application was untimely and that timeliness is a jurisdictional issue, the Counsel for Employer has not put forth any evidence rebutting this presumption. This is insufficient to rebut the presumption in favor of timeliness. I find that the claim has been timely filed.

Length of Coal Mine Employment

The Claimant alleges approximately fourteen and one half years of coal mine employment, and prior adjudicators have concluded that the record demonstrates anywhere from nine to slightly over ten years of coal mine employment.[5] For purposes of the Act and regulations, a "miner" is any person who works or who has worked in or around a coal mine or coal preparation facility in the extraction, preparation or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. 725.101(a)(19), 725.202(a). The employment history form indicates that Claimant began working underground in the coal mines in 1980 (D-2). However, it also indicates that Claimant was employed in the transportation of coal from the mines as far back as 1974. ***Id.*** Social Security records confirm that Claimant worked for Turner Trucking Company for the first quarter of 1975 (D- 4). In the employment history form, Claimant maintains that he was employed as a coal truck driver where he was exposed to coal dust (D-2).

The regulations provide a formula for establishing a miner's length of coal mine employment. First, 20 C.F.R. § 725.101(a) (32) indicates that "year" means a calendar year consisting of either 365 or 366 days, or partial periods totaling one year, during which a miner worked in and around a coal mine for at least 125 working (paid) days. If the miner worked at least 125 days in a calendar year, or "partial periods totaling one year", then he is given credit for one year of employment. 20 C.F.R § 725.101(a)(32)(i). However, if he worked fewer than 125

[5] *See* Decision and Order denying benefits, October 18, 2001 (finding no more than nine years of employment); Proposed Order and Decision denying benefits, August 31, 2005 (finding of 9.33 years of coal mine employment); Decision and Order by ALJ dated July 29, 1998 (finding slightly over 10 years of coal mine employment.)

of coal mine employment days in a year, then he receives credit for only a fractional year based on the ratio of the number of days actually worked to 125 days, 20 C.F.R. § 725.101(a)(32)(i). Preferably, the actual length of coal mine employment will be determined based on the actual beginning and ending dates of all periods of coal mine employment to the extent permitted by the evidence. 20 C.F.R. § 752.101(a)(32)(ii). Such a calculation may be based on all credible evidence, including co-workers affadavits and sworn testimony. However, if the evidence is insufficient to establish the beginning and ending dates of the examiner's coal mine employment, then the regulations indicate that the miner's yearly income be divided by the coal industry's average daily earning for the year as reported by the Bureau of Labor Statistics ("BLS"), 20 C.F.R. § 725.101 (a) (32) (iii).

Although Mr. B.C. worked for several years in other industries, he first started working in the coal mine industry in 1974 for the Turner Trucking Company in Big Stone Gap, VA. (DX4,6) The miner stopped working in the coal mine industry in 1991. (DX6) The evidence is not sufficient to establish beginning and ending dates for the entire length of the miner's coal mine employment. In addition, the miner did not work for a full calendar year during each of the years in which he was employed as a coal miner. Consequently, for those periods in which the miner did not work for a full calendar year or where a beginning and end date is not established, the regulations permit me to compute the miner's length of employment by dividing the miner's yearly income from work by the coal mine industry's average daily earnings for that year. *See* 20 C.F.R. §725.301(a)(32)(iii). A copy of the BLS table is listed below.

Average Earnings of Employees in Coal Mining		
Year	**Yearly (125 days)**	**Daily**
1992	17,200.00	137.60
1991	17,080.00	136.64
1990	16,710.00	133.68
1989	16,250.00	130.00
1988	15,940.00	127.52
1987	15,750.00	126.00
1986	15,390.00	123.12
1985	15,250.00	122.00
1984	14,800.00	118.40
1983	13,720.00	109.76
1982	12,698.75	101.59
1981	12,100.00	96.80
1980	10,927.50	87.42
1979	10,878.75	87.03
1978	10,038.75	80.31
1977	8,987.50	71.90
1976	8,008.75	64.07
1975	7,405.00	59.24
1974	6,080.00	48.64

1973	5,898.75	47.19
1972	5,576.25	44.61

The SSA record shows that the Claimant earned $792.50 in 1974 and $566.12 in 1975 working for the Turner Trucking Company. (DX6) These figures divided by the average daily earnings as published in the BLS table yield totals of 16 and 11 working days, respectively.[6]

Next, the Claimant worked for the Austin Powder Company from 1975 to 1979. In the hearing, the Claimant testified that he was a truck driver for the powder company and that he delivered powder and nitro to strip jobs and help load the holes.[7] The miner helped load the holes occasionally. The Claimant has not submitted evidence that this particular position involved the transportation, extraction, or preparation of coal. There is not sufficient evidence to conclude that the Claimant, while working as a trucker for the Austin Powder Company, was a "miner" as defined under the Act. 20 C.F.R. § 725.202(a) Thus, this period of time cannot be considered as coal mine employment because the Claimant has not demonstrated that he was working as a miner between the period 1975-1979.

In 1980, the miner worked for three separate coal mining companies: Nicholson Company, Bullion Hollow Coal Company, and B&H Explosives Company. (DX4) The total earnings from each of those companies during 1980 was $3463.50. (DX4) This yields approximately 89 working days for the miner in 1980. From 1981-1983, the miner was employed by the Fountain Bay Mining Company. He had sufficient income to qualify for 2 years of employment. From 1984 to 1987, the miner was employed at Little David Coal Company. (DX4) The miner had sufficient income in 1985 and 1986 for those years to qualify as a full year of employment.

In 1987-1988, the miner worked for Southland Enterprises as a roof bolter and miner. (DX4, 6) The miner can be credited with one year of full employment for the two years because his income in one of the years was insufficient. In 1989, the miner worked for Mountaineer Coal Co. and also for Clinchfield Coal Co. His income for 1989 was sufficient to qualify him as working for a full, year. In 1990, he worked for Clinchfield Coal Co, Kelly Energy, and also for Bullion Hollow Enterprises and Jericol Mining Inc. (DX4) The combined income from all four employers during 1990 was $21373.48. Based on the average earnings of employees in coal mining, this amount was sufficient to constitute a full year of coal mine employment during 1990.

In determining the length of Mr. B.C.'s length of coal mine employment, I have considered the coal mine employment form he completed, as well as the SSA earnings record submitted. Either one of these may be used exclusively to determine the Claimant's length of coal mine employment. *See generally* ***Harkey v. Alabama By-Products Corp.***, 7 B.L.R. 1-26 (1984); ***Bizarri v. Consolidation Coal Co.***, 7 B.L.R. 1-343 (1984); ***Coval v. Pike Coal Co.***, 7 B.L.R. 1-272 (1984); ***Gilliam v. G & O Coal Co.***, 7 B.L.R. 1-59 (1984); ***Tackett v. Director, OWCP***, 6 B.L.R. 1-839 (1984). Clearly, between 1974 to 1991, a period of 17 years, Mr. B.C. did work as a coal miner, although not consistently. As the SSA earnings record shows, Mr. B.C.'s employment as a coal miner was both sporadic and, in many years, limited, often varying significantly in the amount of income earned. Neither beginning nor ending dates of

[6] $792.50 divided by $48.64 yields approximately 16 working days. The SSA record shows earnings for two quarters but does not list beginning and ending dates for those quarters, thus precluding an accurate assessment of the number of working days for the year.

[7] TR at 21-25. "TR" refers to the transcript of the hearing on June 28, 2006 in Abingdon, VA.

employment are given for many of the years reported on the SSA report. Consequently, the Bureau of Labor Statistics table along with the earnings of Claimant, as reported on the SSA statement, were utilized to determine the length of the Claimant's coal mine employment. I credit the miner with 7 years of coal mine employment.

REQUEST FOR MODIFICATION

Any party to a proceeding may request modification at any time before one year from the date of the last payment of benefits or at any time before one year after the denial of a claim. 20 C.F.R. § 725.310(a). Upon the showing of a "change in conditions" or a "mistake in a determination of fact," the terms of an award or the decision to deny benefits may be reconsidered. 20 C.F.R. § 725.310. An order issued at the conclusion of a modification proceeding may terminate, continue, reinstate, increase or decrease benefit payments or award benefits.

On June 24, 2003, the District Director issued a Proposed Decision and Order denying benefits to the Claimant. The Claimant did not reply to the Proposed Decision and the Order became final on July 24, 2003. Approximately one year later, on July 26, 2004, the Claimant filed a new claim for benefits. Because July 24, 2004, was a Saturday, the Claimant had until Monday, July 26, 2004, to file a petition for modification. Deadlines falling on a Saturday, Sunday, or holiday are automatically extended to the next business day. *See* ***Gross v. Dominion Coal Corp.***, 22 B.L.R. 1, BRB No. 03-0118 BLA (Oct. 29, 2003). Thus, the claim filed on July 26, 2004 represented a request for modification of the District Director's Decision and Order. A Proposed Decision and Order was issued on August 31, 2005, this time awarding benefits to the Claimant. On September 13, 2005, the Employer expressed disagreement with the determination and requested a hearing before an ALJ.

According to the courts and BRB, the phrase "change in conditions" refers to a change in a claimant's physical condition. *See* ***General Dynamics Corp. v. Director, OWCP***, 673 F.2d 23 (1st Cir. 1982) and ***Lukman v. Director, OWCP***, 11 B.L.R. 1-71 (1988) (Lukman II). Under the regulatory provisions, to determine whether a claimant demonstrates a change in conditions, an administrative law judge ("ALJ") must first conduct an independent assessment of all newly submitted evidence. Then, the ALJ must consider this new evidence in conjunction with all evidence in the official U.S. Department of Labor record to determine if the weight of the evidence is sufficient to establish an element of entitlement which was previously adjudicated against the claimant. ***Kingery v. Hunt Branch Coal Co.***, 19 B.L.R. 1-6 (1994); ***Napier v. Director, OWCP***, 17 B.L.R.1-111 (1993); ***Nataloni v. Director, OWCP***, 17 B.L.R. 1-82 (1993); ***Kovac v. BCNR Mining Corp.***, 14 B.L.R. 1-156 (1990), *aff'd. on reconsideration*, 16 B.L.R. 1- 71 (1992).

The modification process has been further expanded by the United States Supreme Court and federal Courts of Appeals when they considered cases involving the mistake of fact factor listed in the regulations. In ***O'Keefe v. Aerojet-General Shipyards, Inc.*** 404 U.S. 254, 257 (1971), the United States Supreme Court indicated that an ALJ should review all evidence of record to determine if the original decision contained a mistake in a determination of fact. In considering a motion for modification, the ALJ is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."

In evaluating a request for modification under § 725.310, it is not enough that the administrative law judge conduct a substantial evidence review of the district director's finding.

Rather, the claimant is entitled to de novo consideration of the issue. ***Kovac v. BCNR Mining Corp.***, 14 B.L.R. 1-156 (1990), aff'd on recon., 16 B.L.R. 1-71 (1992); ***Dingess v. Director, OWCP***, 12 B.L.R. 1-141 (1989); ***Cooper v. Director, OWCP***, 11 B.L.R. 1-95 (1988). *See also* 20 C.F.R. § 725.310(c).

The circuit courts and Benefits Review Board have held that, for purposes of establishing modification, the phrase "change in conditions" refers to a change in the claimant's physical condition. *See* ***General Dynamics Corp. v. Director, OWCP***, 673 F.2d 23 (1st Cir. 1982); ***Director, OWCP v. Drummond Coal Co.***, 831 F.2d 240 (11th Cir. 1987); ***Lukman v. Director, OWCP***, 11 B.L.R. 1-71 (1988) (Lukman II). *See, e.g.*, ***Amax Coal Co. v. Franklin***, 957 F.2d 355 (7th Cir. 1992) (letter from miner's physician indicating that the miner may have black lung disease did not establish a "change in conditions," but was sufficient to warrant reopening the claim based upon a "mistake in a determination of fact"). In ***Jessee v. Director, OWCP***, 5 F.3d 723 (4th Cir. 1993), the Court held that a request for modification may be based upon an allegation "that the ultimate fact – disability due to pneumoconiosis – was mistakenly decided . . ." The Board has yet to comprehensively define the phrase "mistake in a determination of fact." Several circuit courts of appeals have, however, concluded that it is to be interpreted broadly and includes any challenge to the ultimate issue of whether the miner is totally disabled due to pneumoconiosis.

The initial application was filed in 1991. This is a request for modification of the denial of the initial application. The claim is adjudicated under the pre-amended regulations.[8]

Upon adjudication of Mr. B.C.'s claim, Judge Miller determined that the Claimant did not establish the presence pneumoconiosis and failed to demonstrate that his total disability was due to pneumoconiosis, although he was able to establish total disability. In a Proposed Decision and Order issued on June 24, 2003, which became final on July 24, 2003, the District Director denied a request for modification because the Claimant had failed to establish that total disability was due to pneumoconiosis. In light of that finding, I will first evaluate whether Mr. B.C. is able to demonstrate a change of conditions through new evidence developed since the record closed on July 24, 2003 by demonstrating that he suffers from pneumoconiosis or that his total disability is due to pneumoconiosis.

I will also review the entire evidentiary record to determine whether there has been a mistake in a determination of fact.

Change in Conditions

The circuit courts and Benefits Review Board have held that, for purposes of establishing modification, the phrase "change in conditions" refers to a change in the claimant's physical condition. *See* ***General Dynamics Corp. v. Director, OWCP***, 673 F.2d 23 (1st Cir. 1982); ***Director, OWCP v. Drummond Coal Co.***, 831 F.2d 240 (11th Cir. 1987); ***Lukman v. Director, OWCP***, 11 B.L.R. 1-71 (1988)(Lukman II).

In determining whether a "change in conditions" is established, the fact-finder must conduct an independent assessment of the newly submitted evidence (all evidence submitted subsequent to the prior denial) and consider it in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to demonstrate an element

[8] The Claimant filed the initial application in 1991. Since then, no subsequent claims have been filed and five requests for modification have been made. The multiple petitions for modification pertain to the denial of the initial application. Because the application was filed in 1991, the claim is to be adjudicated under the pre-amended regulations.

or elements of entitlement previously adjudicated against claimant. ***Kingery v. Hunt Branch Coal Co.***, 19 B.L.R. 1-6 (1994) ("change in conditions" not established where the existence of pneumoconiosis by chest x-ray demonstrated in the original claim and claimant merely submitted additional positive x-ray readings on modification); ***Napier v. Director, OWCP***, 17 B.L.R. 1-111 (1993); ***Nataloni v. Director, OWCP***, 17 B.L.R. 1-82 (1993); ***Kovac v. BCNR Mining Corp.***, 14 B.L.R. 1-156 (1990), aff'd on recon., 16 B.L.R. 1-71 (1992). Under this change of conditions analysis, I evaluate the new evidence submitted since the close of the record on July 24, 2003 (the date of the last denial), in conjunction with the previously submitted evidence.

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[9] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[10] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-Ray Evidence

The newly submitted evidence since the prior denial consists of seven readings of four x-rays.[11]

Drs. Wheeler, Fino, and Scatarige read the x-rays as negative for pneumoconiosis. Dr. Barrett read the film for quality purposes only but noted bullae and definite emphysema. Dr. Rasmussen read the x-rays as minimally positive, with 1/0 profusion and indicating the presence of small irregular opacities, while Dr. Hippensteel noted the same size opacities with a classification of 0/1. Dr. Deponte read the film as positive and noted increasing sizes of opacities, classifying them as s/t with a profusion of 2/1.

Biopsy and Presumption

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

[9] 20 C.F.R § 718.201(a).
[10] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).
[11] Dr. Barrett read the film for quality purposes only.

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Numerous medical reports have been submitted by various doctors since the prior denial. There are three separate reports from Dr. Rasmussen. On each one Dr. Rasmussen concludes that the miner suffers from an obstructive pulmonary impairment and makes a diagnosis of COPD. Drs. Hippensteel and Fino do not see changes consistent with pneumoconiosis and, although both indicate a respiratory impairment, neither attributes the pulmonary impairment to coal mine dust exposure.

Discussion

Drs. Hippensteel, Fino, Scatarige, and Wheeler read the x-rays as negative for pneumoconiosis, while Drs. Rasmussen, Deponte, and Patel read the films as minimally positive. "[W]here two or more x-ray reports are in conflict…consideration must be given to the radiological qualifications of the physicians interpreting such x-rays." §718.202(a)(1). Only Drs. Rasmussen, Hippensteel, and Fino are not dually qualified B-reader and Board-certified physicians. Although I accord greater weight to the dually qualified readers, this alone is insufficient to tilt the weight of the evidence in favor of the Claimant. The most recent x-ray, taken on March 1, 2006, was read as negative by Dr. Hippensteel and positive by Dr. Deponte. Both Dr. Deponte and Dr. Hippensteel are B-readers, but Dr. Deponte is also board-certified. I accord greater weight to her interpretation of the x-ray because she is dually qualified. Similarly, I accord greater weight to Dr. Scatarige's negative interpretation of the February 14, 2006 x-ray over Dr. Rasmussen's positive reading because Dr. Scatarige is dually qualified.[12] The Board has held that it is proper to credit the interpretation of a dually qualified physician over the interpretation of a B-reader. *See* ***Cranor v. Peabody Coal Co.***, 22 B.L.R. 1-1 (1999) (en banc on recon.); ***Sheckler v. Clinchfield Coal Co.***, 7 B.L.R. 1-128 (1984).

The negative readings slightly outnumber the positive ones. The evidence is insufficient for a finding of pneumoconiosis on the basis of x-rays. The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co.***, 14 B.L.R. 1-70 (1990), although it is within my discretion to do so, ***Edmiston v. F & R Coal Co.***, 14 B.L.R. 1-65 (1990); *see also* ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993); ***Tokaricik v. Consolidation Coal Co.***, 6 B.L.R. 1-666 (1984). My evaluation of the newly submitted x-ray evidence in conjunction with the previously submitted x-ray evidence does not indicate a change in condition on the issue of pneumoconiosis through the use of x-ray evidence. In Judge Miller's Decision of October 16, 2001, nine x-rays were interpreted twenty six times. There was no evidence of pneumoconiosis based on those readings and I do not find a change based on the newer evidence.

[12] Dr. Scatarige is a dually qualified B-Reader and Board certified physician. Dr. Rasmussen has B-reader certification.

I find that the Claimant has not established the presence of pneumoconiosis through the use of x-ray evidence. However, no claim for benefits shall be denied solely on the basis of a negative chest x-ray. 20 C.F.R. § 718.202(b).

The Claimant has not submitted a biopsy report and the presumptions described in Sections 718.304, 718.305, or 718.306 are not applicable to the instant claim. Therefore, the only other method by which to establish the presence of pneumoconiosis is through reasoned medical opinions.

The medical reports submitted by the various doctors indicate a dispute on the existence of clinical pneumoconiosis. However, the definition of pneumoconiosis includes not only "clinical" or "medical" pneumoconiosis, but also statutory or "legal" pneumoconiosis. "[A] disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." §718.201(a)(2). The legal definition of pneumoconiosis is broad and may encompass more respiratory or pulmonary conditions than those specifically, clinically diagnosed in a medical opinion. For example, a physician may conclude that the miner suffers from asthma, which is related to his coal dust exposure. Although the physician did not specifically state that the miner suffered from pneumoconiosis or black lung disease, the respiratory condition that he diagnoses is related to coal dust exposure and, therefore, is supportive of a finding of legal pneumoconiosis.

Causation

The issue of causation is subsumed within the definition of legal pneumoconiosis such that the establishment of a pulmonary impairment by itself does not constitute legal pneumoconiosis. The impairment must be related to or aggravated by coal dust exposure. There is dispute as to whether the miner's pulmonary disease is related to coal dust exposure.

There is consensus among the physicians rendering medical opinions that the Claimant suffers from some form of respiratory impairment. Dr. Fino finds the presence of emphysema, and Dr. Rasmussen finds coal workers' pneumoconiosis and emphysema. Similarly, Drs. Agarwal and Nida indicate that the Claimant suffers from a chronic obstructive pulmonary disease. Dr. Hippensteel also concludes that the Claimant suffers from emphysema, although in his deposition he characterizes the respiratory condition as bullous emphysema which is congenital and usually worsens with age. In his opinion, it is unrelated to coal mine dust exposure. Dr. Hippensteel also discounts Dr. Rasmussen's conclusions as not supported by the medical literature. In ***Hughes v. Clinchfield Coal Co.***, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to the claimant's coal mine employment.

Citing the Claimant's then current medical condition and relying on previous pulmonary function tests and a positive x-ray read by Dr. Patel, Dr. Nida made a definitive diagnosis of COPD and CWP. Similarly, Dr. Agarwal reviewed the Claimant's family, social, and work history and indicated that the Claimant suffered from severe COPD and coal workers' pneumoconiosis. I find Dr. Nida's brief opinion of little probative value. It is neither well-documented nor based on extensive data. Reliance on one physician's interpretation of an x-ray without consideration of many others which are in the record gives an incomplete description of the miner's condition. Furthermore, Dr. Nida relies on pulmonary function tests for determining the presence of a pulmonary impairment. The Board has held that pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis. *See* ***Burke v. Director, OWCP***,

3 B.L.R. 1-410 (1981). In addition, Dr. Nida mentions the Claimant's smoking history but does not discuss to what extent it may have contributed or caused the respiratory impairment that he concludes the miner suffers from. Dr. Aggarwal's opinion is also without sufficient basis. His findings come as a result of a physical examination without consideration of any objective data. Dr. Aggarwal omits reference to the miner's smoking history, as well recent x-rays and objective tests.

Dr. Fino opines that the miner suffers from emphysema but that the pulmonary impairment is due to the Claimant's extensive smoking history. Dr. Fino cites several studies to support his proposition that there exists a correlation between clinical emphysema and clinical pneumoconiosis. Dr. Fino fails to account for the presence of legal pneumoconiosis which does not require a clinical diagnosis. I accord little weight to Dr. Fino's opinion.

Dr. Rasmussen performed an examination on the miner in October 2004. Considering the miner's family, social, and family history, as well as objective tests, coal mine employment, and a 36 year, ½ pack per day smoking history, Dr. Rasmussen concluded that the miner suffered from a severe, disabling chronic lung disease. He stated that both smoking and coal mine dust exposure are two known risk factors for COPD/emphysema. Dr. Rasmussen found that coal mine dust exposure was a significant contributory factor to the Claimant's respiratory impairment. His initial assessment was based on an erroneous assumption of the coal miner's length of employment of 15 years. When asked to reassess his evaluation and findings in light of the fact that the miner had 9 years of coal mine employment, Dr. Rasmussen asserted that 9 years of coal mine employment as a roof bolter, in one of the most hazardous underground job so far as dust is concerned, is quite sufficient to cause coal workers' pneumoconiosis. While it is not possible to proportion the degree of disabling lung disease, Dr. Rasmussen concludes that coal mine dust exposure is a significant cause. (DX14) I am left with assessing the relative weight I attribute to the opinions of Dr. Rasmussen and Dr. Hippensteel.

Dr. Hippensteel discounted the conclusions of Dr. Rasmussen, but did not explain in detail why Dr. Rasmussen's use of the medical literature could not support his proposition. He also agreed with Dr. Fino's conclusions, which I have discounted. The record also shows that Dr. Rasmussen's most recent examination of the Claimant occurred in October 2004. Dr. Hippensteel last examined the Claimant in September 1997. In addition, Dr. Hippensteel opines that Claimant's bullous emphysema is congenital in nature and usually worsens with age, and can be worsened by smoking. According to Dr. Hippensteel, it cannot be associated with simple pneumoconiosis unless the pneumoconiosis becomes complicated.(TR2 at 16) [13] Dr. Hippensteel forecloses the possibility that the miner's emphysema can be related to or aggravated by coal mine dust exposure, unless there is a presence of complicated pneumoconiosis and provides no reasonable rationale for his opinion that the miner's emphysema is a pulmonary impairment associated with complicated but not simple pneumoconiosis. Asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. ***Robinson v. Director, OWCP,*** 3 B.L.R. 1-798.7 (1981); ***Tokarcik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1983). In ***Hughes v. Clinchfield Coal Co.***, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to the claimant's coal mine employment.

Furthermore, Dr. Hippensteel opines that the miner's length of employment is an insufficient amount of time to result in significant exposure to coal mine dust, even though he concedes that the miner's job as a roof bolter is one of the most hazardous in the mines. He fails

[13] TR2 refers to the deposition transcript of Dr. Kirk Hippensteel, June 19, 2006.

to account for the possible aggravating factor this may have had on the respiratory impairment of the Claimant. Therefore, Dr. Hippensteel's opinion is entitled to less weight.[14]

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *See* ***Burns v. Director, OWCP***, 7 B.L.R. 1-597 (1984). I note that Dr. Hippensteel is a pulmonary specialist. Dr. Rasmussen is board certified in internal medicine with a subspecialty in pulmonary medicine. However, Dr. Rasmussen also has significant experience in pulmonary medicine.[15] Both doctors are qualified and I do not find significant variation in qualifications to merit substantial differences in the amount of weight I attribute to their respective opinions.

My assessment is based on the adequacy of the explanations and the thoroughness of the respective medical reports and conclusions. I find Dr. Rasmussen's medical opinion persuasive and well-reasoned. Considering the new evidence in conjunction with the previously submitted evidence, I conclude that the Claimant has established the presence of pneumoconiosis.

Total Disability

A miner shall be considered totally disabled if s/he has complicated pneumoconiosis (§718.304 - irrebuttable presumption) or if pneumoconiosis prevents him or her from doing his usual coal mine employment or comparable and gainful employment (§718.204(b) - rebuttable presumption).

Section 718.204(c) provides that, *in the absence of contrary probative evidence*, evidence which meets the quality standards of the subsection shall establish a miner's total disability. The administrative law judge cannot merely weigh like/kind evidence. Specifically, it is error to look at all the pulmonary function studies and conclude that the miner is totally disabled, or to look at all the blood gas studies to conclude that the miner is totally disabled. The administrative law judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If so, the administrative law judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *See* ***Troup v. Reading Anthracite Coal Co.***, 22 B.L.R. 1-11 (1999) (en banc); ***Fields v. Island Creek Coal Co.***, 10 B.L.R. 1-19, 1-21 (1987); ***Shedlock v. Bethlehem Mines Corp.***, 9 B.L.R. 1-195, 1-198 (1986).

The miner has not been diagnosed with complicated pneumoconiosis and the presumption of §718.304 does not apply.

Drs. Fino, Hippensteel, and Rasmussen all diagnose the Claimant with a totally disabling respiratory impairment. Dr. Fino concluded that the Claimant was totally disabled from performing his last coal mine job. Dr. Hippensteel opined that the Claimant was totally disabled but also added that the disability would have occurred had he never stepped in the mines. Only Dr. Aggarwal and Dr. Nida omit any reference to the Claimant's capacity to return to gainful employment or to his usual coal mine employment. The assessments are corroborated by the objective tests. Each of the four pulmonary tests performed by Drs. Rasmussen, Fino, and Hippensteel, yielded qualifying values with little or no improvement post bronchodilator. All

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[14] Dr. Hippensteel's position is similar to other opinions that attempt to differentiate emphysema from pneumoconiosis. ***Bethenergy Mines, Inc. v. Director, OWCP [Rowan***], Case No. 01-2148 (4th Cir. Sept. 4, 2002) (unpub.).

[15] Dr. Rasmussen also is "an acknowledged expert in the field of pulmonary impairments of coal miners." ***1972 U.S. Code Cong. Adm. News 2305, 2314***. As the Sixth Circuit Court of Appeals more recently stated, "Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis." ***Martin v. Ligon Preparation Co***., 400 F.3d 302 (6th Cir. 2005).

five of the blood-gas studies conducted since October 2004 yield qualifying values with little or no variation over time. As far back as July 1998, Claimant had undergone pulmonary tests, some of which yielded qualifying values. Judge Morgan, in a Decision denying benefits, found that the Claimant had established total disability by way of reasoned medical opinions. Judge Miller, in a decision issued October 2001, also concluded that there was unanimous agreement as to the disabling respiratory impairment of the Claimant.

The recently submitted evidence, in conjunction with the previously submitted evidence of record establishes that the Claimant has a totally disabling respiratory impairment. There is no contrary probative evidence which outweighs the affirmative evidence establishing the Claimant's total disability.

Due to Pneumoconiosis

As jurisdiction for this claim vests in the Sixth Circuit, the Court has required that total disability be "due at least in part" to pneumoconiosis. *See* ***Adams v. Director, OWCP***, 886 F.2d 818, 825 (6th Cir. 1989); ***Zimmerman v. Director, OWCP***, 871 F.2d 564, 566 (6th Cir. 1989); ***Roberts v. Benefits Review Board***, 822 F.2d 636, 639 (6th Cir. 1987). However, in ***Peabody Coal Co. v. Smith***, 127 F.3d 504, 507 (6th Cir. 1997), the Sixth Circuit held that, although pneumoconiosis need only be a "contributing cause" to the miner's total disability, a claimant must demonstrate that the disease was more than a de minimus or "infinitesimal" factor in the miner's total disability.

The miner's smoking history spans nearly 30 years and consisted of smoking between ½ to ¾ packs per day. The miner has approximately 7 years of coal mine employment as a roof bolter with substantial exposure to coal mine dust in one of the more hazardous jobs inside the mine. While both of these are factors in the miner's respiratory impairment, the issue is whether the impairment is more than a de minimus factor in the miner's total disability.

Drs. Hippensteel and Fino conclude that the Claimant is disabled but not due to coal mine dust exposure. The reasoning of both doctors leads to the conclusion that the miner's totally disabling condition is related to smoking. Pneumoconiosis need not be the principal cause or a significant cause of the disability as long as it is more than a de minimus factor. Dr. Hippensteel's and Dr. Fino's complete exclusion of pneumoconiosis as a causative factor in the miner's total disability is not based on a reasoned assessment of the evidentiary record. A persuasive and reasoned explanation is not given as to why the miner's seven years of coal mine employment in a hazardous job with significant exposure to coal mine dust did not contribute, more than a de minimus amount, to his disability.

Moreover, in reviewing the medical opinion evidence regarding etiology, opinions wherein the physicians did not diagnose the miner as suffering from pneumoconiosis may be accorded little probative value, as they are contrary to my findings.

Both Drs. Hippensteel and Fino concluded that the miner did not have changes consistent with CWP and also added that the Claimant did not suffer from medical or legal pneumoconiosis. I also accord little weight to the opinions of Drs. Hippensteel and Fino because they are contrary to my findings.

Conclusion

The Claimant has established a change in condition by establishing, through a preponderance of the evidence, the existence of legal pneumoconiosis. The Claimant has also established that he is total disabled due to pneumoconiosis. Therefore, the Claimant is entitled to

benefits under the Act. In reviewing all of the evidence in the record, I do not find a mistake of fact.

Commencement of the Payment of Benefits

Once it is determined that the claimant is entitled to benefits under the Act, the fact-finder must determine from what date benefit payments should begin. For Part C claims, if the claimant is a miner totally disabled due to pneumoconiosis, the claimant should be paid his or her benefits beginning with the month of onset of total disability due to pneumoconiosis. 33 U.S.C. §906(a), as incorporated at 30 U.S.C. §932(a). *See* ***Carney v. Director, OWCP***, 11 B.L.R. 1-32 (1987). If the month of onset of total disability due to pneumoconiosis cannot be deduced from the medical evidence of record, the claimant should be paid beginning with the month during which the claim was filed. *See* ***Owens v. Jewell Smokeless Coal Corp.***, 14 B.L.R. 1-47 (1990). For claims filed on or after January 1, 1974, the claimant should be paid his or her benefits beginning with the month of onset of total disability due to pneumoconiosis. 33 U.S.C. § 932(a). *See* ***Carney***. "[A] miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. The miner's pneumoconiosis must be more than merely a speculative cause of his total disability." ***Peabody Coal v. Smith***, 127 F.3d 504 (6th Cir. 1997).

The claimant bears the burden of establishing the date of onset of total disability. *See, e,g.*, ***Johnson v. Director, OWCP***, 1 B.L.R. 1-600 (1978).

Judge Morgan, in his Decision issued in July 1998, found the Claimant totally disabled. Both Drs. Dahhan and Hippensteel were of the opinion that the Claimant was unable, from a respiratory standpoint, to perform his last coal mine job. However, judge Morgan concluded that the totally disabling impairment was entirely due to smoking. Likewise, judge Miller, in a decision issued in October 2001, also found the Claimant totally disabled based on medical opinion, but concluded that coal mine dust exposure had not, in any way, caused or contributed to the totally disabling respiratory impairment.

Dr. Rasmussen's medical examination and report of October 25, 2004, is the first determination of the Claimant's disability due to pneumoconiosis. Dr. Rasmussen concluded that smoking and coal mine dust exposure were two known risk factors in respiratory impairment, that both were implicated as contributing to the miner's respiratory condition, and that coal mine dust exposure was a significant contributory factor in the total disability of the miner. This is the earliest date in the record in which a finding of total disability due to pneumoconiosis is made. No other evidence prior to this date demonstrates that the Claimant was totally disabled due to pneumoconiosis. I find that the onset of total disability due to pneumoconiosis commences as of October 2004.

Augmentation of Benefits

A claimant's award of benefits under Part C of the Act should be augmented on behalf of the following dependents who meet the conditions of relationship set out in the regulations: (1) spouse; (2) divorced spouse; or (3) child. 20 C.F.R. §725.210. For the miner's benefits to be supplemented because of any of these relationships, the individual must qualify under both a relationship test and a dependency test. The Employer is not contesting the issue of dependency.

The miner has one dependant for purposes of augmentation, his spouse. The miner and his spouse were married on March 20, 1973. (DX8) The miner has proven both the relationship and dependency tests.

Augmentation of benefits commences with the first month in which the dependent satisfies all of the conditions applicable to that particular relationship, according to the regulations at 20 C.F.R. §725.204-725.209 (2001).

Attorney Fees

An application by Claimant's attorney for approval of a fee has not been received. Thirty days is hereby allowed to Claimant's counsel for the submission of such an application. Representative's attention is directed to 20 C.F.R. §§ 725.365 – 725.366. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. Parties have 10 days following receipt of any such application within which to file any objections. The Act prohibits charging of a fee in the absence of an approved application.

ORDER

It is hereby **ORDERED** that the claim of **B.C.** is **GRANTED**. It is furthered ordered that the Employer, **LITTLE DAVID COAL, CO.**, shall pay to the Claimant all benefits to which he is entitled under the Act commencing October 1, 2004, the month in which he was found totally disabled due to pneumoconiosis. Augmentation benefits for the Claimant's spouse commences October 1, 2004.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. §

725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).